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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/067,987

02/08/2002

Jesse H. Gaytan

41775

9925

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7590

01/12/2006

ROYLANCE, ABRAMS, BERDO & GOODMAN, L.L.P.
1300 19TH STREET, N.W.
SUITE 600
WASHINGTON,, DC 20036

EXAMINER

COLE, MONIQUE T

ART UNIT

PAPER NUMBER

1743

DATE MAILED: 01/12/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/067,987

Applicant(s)

GAYTAN, JESSE H.

Examiner

Monique T. Cole

Art Unit

1743

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 07 April 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1 and 3-36 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1 and 3-11, 14-21, 24-27, 30-33, 35 and 36 is/are rejected.
- 7) ☒ Claim(s) 12,13,22,23,28,29 and 34 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claim Rejections - 35 USC § 103

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

3. Claims 1-11, 14-21, 24, 25, 30, 31, 35 & 36 are rejected under 35 U.S.C. 103(a) as being unpatentable over USP 6,337,323 to Cummings et al. (herein referred to as "Cummings") in view of USP 5,645,845 to Neumann et al. (herein referred to as "Neumann") & USP 5,118,506 to Eichoefer (herein referred to as "Eichoefer").

Cummings teaches a chemically, stable insecticidally active pellet having a low moisture content (up to .05% water) and at least about 95% of the active ingredient, acephate. See abstract and col. 4, lines 5-67. The insecticidal pellet may also contain a binder, vinylpyrrolidone-vinyl acetate copolymer (col. 5, lines 19-24). Cummings teaches that the present formulation "reduces" the offensive odors associated with acephate usage (col. 6, lines 27-28). Moreover, the Cummings reference recognizes that those of skill in the insecticidal art

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would know that minor amounts of inert ingredients could be admixed with the active ingredient as long as the addition of the materials did not conflict with or adversely affect the basic characteristics of the pellets formed in accordance with the invention. At col. 20, lines 29-31, Cummings states “the pellets of the present invention can contain. . . reodorants.” For the record, reodorants are defined as powerful pleasant smelling chemicals which are added to a formulation to mask unpleasant odors.

Neumann teaches an insecticidal formulation that teaches lemon oil, pinene, limonene and terpineol among perfumes that are useful in masking odor rendered from an insecticidal composition (col. 4, line 62; col. 5, lines 7-12). Eichoefer teaches an insecticidal pellet formulation which contains pine oil and alpha-pinene as contributors to the insecticidal capabilities of the formulation (col. 2, lines 3-10; col. 3, lines 27-28). Thus, given the collective knowledge in the art that 1) pinene & other terpene hydrocarbons and alcohols contribute to insecticidal effectiveness of insecticides, and 2) these components are further useful as perfumes, thereby masking the known offensive odor associated with insecticide use, it would have been obvious to one of ordinary skill in the art to modify the Cummings formulation by including any of the perfuming agents taught in Neumann, and in particular pinene, limonene, terpineol because of the added benefit taught by Eichoefer. By so doing, the Cummings formulation would obtain increased insecticidal benefits and the range of use would be broadened to include areas such as public parks, golf courses or other areas frequented by the public where offensive odor would be a deterrent.

Double Patenting

4. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or

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improper timewise extension of the “right to exclude” granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

5. Claims 26, 27, 30, 31, 32 and 33 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 14, 19, 33 and 34 of copending Application No. 10/508,407. Although the conflicting claims are not identical, they are not patentably distinct from each other because both applications claim a granulated insecticidal composition comprising phosphoroamido(di)thioate solid (acephate) and a binding agent. While the instant claims additionally comprise a masking agent, it would have been obvious to one of ordinary skill in the art to modify the composition, as it is well known that acephate insecticides can have an unpleasant, objectionable odor in the treated area that may restrict times that the composition may be applied. The inclusion of masking agent would eliminate the restrictive use of the acephate.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Response to Arguments

6. Applicant's arguments filed 4/7/2005 have been fully considered but they are not persuasive.

Applicant's arguments are twofold: 1) Cummings does not teach or suggest that a perfume or odor-covering agent should be used; and 2) Both Neumann & Eichoefer are inapplicable because they do not have a technological feature or motivation in common with Cummings.

With regard to applicant's first argument, applicant's attention is directed to col. 20, lines 29-31 of Cummings where it states, "the pellets of the present invention can contain . . . reodorants." For the record, reodorants are defined as powerful pleasant smelling chemicals that are added to a formulation to mask unpleasant odors. Thus, applicant's characterization of Cummings reference is incorrect.

With regard to the Neumann & Eichofer references, the references were used only for exemplary purposes to demonstrate that such perfumes/masking agents/reodorants are conventionally used insecticidal formulations. The references are all directed to insecticidal formulations and they all have interest in masking the odor therefrom.

7. The declaration under 37 CFR 1.132 filed 4/7/2005 is insufficient to overcome the rejection of the claims as set forth in the last Office action because: the showing is not commensurate in scope with the claims. Specifically, the declaration does not the applied references and why the recited perfumes would be ineffective even though they are used in other insecticidal formulations.

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Allowable Subject Matter

8. Claims 12, 13, 22, 23, 28, 29 & 34 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. The following is a statement of reasons for the indication of allowable subject matter: the prior art does not teach or suggest the insecticidally effective formulation wherein the binder is a polyakylene oxide. The prior art does not teach or suggest a process for making insecticidally effective granules such as instantly claimed where the anhydrous masking agent is sprayed onto the dried extrudates.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Monique T. Cole whose telephone number is 571-272-1255. The examiner can normally be reached on Monday, Tuesday & Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jill Warden can be reached on 571-272-1267. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


Monique T. Cole
Primary Examiner
Art Unit 1743